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IN THE UNITED PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

CENTRAL MFG. CO.
(a Delaware Corporation)
P O Box 35189
Chicago, IL 60707-0189

Opposition No: 91123765

Opposer,

Trademark: HYPERSONIC

vs.

PARAMOUNT PARKS, INC.
8720 Red Oak Blvd.
Charlotte, NC 28217



05-10-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Applicant

Box TTAB/NO FEE

**OPPOSER'S RESPONSE TO APPLICANT'S
MEMORANDUM IN OPPOSITION TO OPPOSER'S
MOTION FOR RECONSIDERATION**

NOW COMES the Opposer in response to Applicant's Memorandum in opposition to Opposer's Motion for Reconsideration, and states as follows:

Applicant's said memorandum in opposition to Opposer's motion for reconsideration contains numerous misstatements of material fact and law, in clear violation of §37 C.F.R., §10.23(b)(4).

The Applicant falsely argues that PARAMOUNT has met its burden of proof with regards to CENTRAL's alleged non-use of its trademark, notwithstanding the fact that CENTRAL is entitled to the statutory presumption of use of its trademark, unless the Applicant has shown evidence of non-use of Opposer's trademark for a period of three years without an intent to resume use. The Applicant has not shown by the mere naked allegations of abandonment contained in its counterclaim that there is sufficient proof to establish that the Applicant must shift the burden of proof to the Opposer to prove a non-abandonment claim.

The Board erred in its order of March 9, 2004, by not acknowledging the Opposer's statutory presumption of use of its trademark. The Applicant attempts to mislead the Board on information that was not part of the decision making process of the Board, that led the Board to

decide on March 9, 2004.

The Applicant, in its said brief, attempts to interject additional false information in order to convince the Board not to grant Opposer's motion for reconsideration.

"A motion for reconsideration is a device that may be used to demonstrate that, based on the facts before the Board when it issued its order and on the applicable law, the Board's ruling is in error and requires appropriate change. The motion may not be used to introduce into the record facts which were previously known and which could have been presented earlier. See Trademark rule 2.127(b) and TBMP §518."

The Applicant is attempting in its said memorandum to interject into the record *new* alleged false facts that are entirely untrue and said facts should be disregarded.

On page 3, Applicant makes a clear misstatement of material fact which the Board may want to consider sanctionable *sua sponte*. The Applicant incorrectly states: "Given Central's refusal to produce documentary evidence and appear for deposition, Paramount's claim for abandonment and efforts to demonstrate non-use are more than sufficient to establish an issue of fact on point; Central cannot hide behind its failure to produce discovery and simultaneously claim that Paramount has not produced sufficient evidence of abandonment."

The Applicant clearly has attempted and is attempting to mislead the Board by raising issues which were not previously raised. In addition, the issues that the Applicant is attempting to interject in its said memorandum in opposition to Opposer's motion for reconsideration are not true. The Opposer has produced substantial documentary evidence, (over 200 documents) clearly establishing that the Opposer's HYPERSONIC mark is in use and not abandoned. The Opposer's representative, LEO STOLLER, has attended a deposition on Wednesday, April 21, 2004, of the Applicant for over four hours and has given unrefuted testimony as to Opposer's use of its HYPERSONIC mark. In addition, the Opposer has taken the deposition with Applicant's counsel present of a witness who has testified that the Opposer's mark HYPERSONIC is in use and not abandoned. The Applicant has, of course, neglected to inform the Board of Opposer's witness' damning testimony also on April 21, 2004, which affirms Opposer's ongoing use of its HYPERSONIC trademark.

The Applicant has not been able to shift the burden to the Opposer establishing a *prima facie* case of abandonment. See generally *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980), *Miller Brewing Co. v. Oland's Breweries, Ltd.*, 189 USPQ 481, 488 (TTAB 1975), *aff'd*, 548 F.2d 349 (CCPA 1976).

" ... the burden of proof for abandonment in a cancellation action as a preponderance of the evidence, the same as the burden for likelihood of confusion. Once nonuse has been proven, the burden of production (not the burden of proof) shifts to the registrant." See *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021 (Fed. Cir. 1989).

The above confirms that the Board erred and/or abused its discretion on page 7 of the Board's order dated March 9, 2004, when the Board found " ... there are no documents in support of opposer's motion for summary judgment establishing that opposer has ever used its pleaded HYPERSONIC mark in commerce ...". The Applicant had not met its burden of proof for abandonment in a cancellation action to establish nonuse. Thus, the burden of production has not shifted to the registrant. The Opposer still enjoys the statutory presumption of use and validity and the Board failed to recognize that as a matter of law.

Applicant's counsel, Lacy Koonce, submitted an affidavit in support of Applicant's memorandum in opposition. The said affidavit contains numerous misstatements of material fact and/or law. At page 2, in paragraph 4, the Applicant submits Exhibit 1, which shows a postage meter date of August 21, 2002. The fact that there is no U.S. Post Office cancellation on the envelope does not establish that Opposer's postage meter date is incorrect.

Applicant's paragraph 5 of its affidavit at page 2 states:

"Since the entry of the March 9, 2004 order, Central has not complied with the Express Mail requirement for all documents served on Applicant; for instance, it served its deposition notices by fax. More importantly, its actions have demonstrated its intent to circumvent even this minimally inconvenient requirement, as set forth below."

The Applicant again misrepresents the facts, attempting to state that the Opposer did not comply with the Express Mail requirement of the Board. Nothing contained in Applicant's affidavit substantiates that the Opposer did not comply with the Express Mail requirement. In

fact, Exhibit 3, attached to Applicant's affidavit, has a photocopy of Opposer's Express Mail certificate which has a April 15, 2004, the date that Opposer express mailed documents to the Applicant.

Applicant's Exhibit 4, attached to the said affidavit, shows that Opposer's Express Mail arrived in New York on April 17, 2004, two days later. The fact that the Applicant received Opposer's Express Mail on April 17, 2004, does not vitiate the fact that it was mailed on April 15, 2004, at a cost of \$18.00 to the Opposer. Applicant is attempting to contaminate the record here in view of the fact that the Applicant has nothing else to rely on in this case. In addition, Opposer's said express mailing contained substantial documents in support of Opposer's production which were produced prior to April 21, 2004, the date that the Opposer's representative, LEO STOLLER, submitted himself to a four and half hour deposition.

Applicant clearly again has misled the Board in its statement contained in paragraph 5: " ... Central has not complied with the Express Mail requirement for all documents served; for instance, it served its deposition notices by fax." This statement is calculated by the Applicant to poison the record, in direct violation of 37 CFR, §10.23(b)(4) - Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Opposer had served the Applicant the notices of deposition via Express Mailing No: ER 854975740 US on April 7, 2004. See attached true and correct copy of Opposer's notices of deposition.¹

Opposer moves to strike Applicant's paragraph 9 of its affidavit.

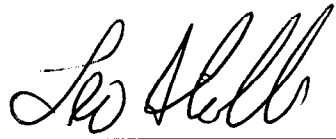
"9. Upon information and belief, this incident and the incident in September 2001 suggest that Mr. Stoller routinely uses a postage machine to put a false postmark on his

1. The Opposer initially faxed a copy of the said notices of deposition to the Applicant on April 2, 2004. The Opposer, in compliance with the Board order regarding the Express Mailing requirement, express mailed to the Applicant three notices of depositions on April 8, 2004, along with Opposer's Motion to Compel. The Opposer sent the notice of Mel Karmazin which shows a date of April 8th under an express mail certificate number ER 854975740 US; deposition notice for Richard Bressler under the same express mail certificate number ER 8549757 US. The mailing date for Mr. Bressler's notice of deposition states April 7, 2004, however, the actual date it was mailed was April 8, 2004, along with Mr. Karmazin's notice of deposition. The April 7, 2004 date on Mr. Bressler's and Mr. Redstone's notices of deposition were a typographical error that was not corrected. Also, the certificate of service attached to Mr. Bressler's notice and Mr. Redstone's notice refers to the Motion to Compel that was filed on April 8, 2004. All three of the said deposition notices were served via Express Mail on April 8, 2004, under Express Mail No: ER 854975740 US.

package, which he then mails at a later date."

Applicant's unfounded said allegation is defamatory and there is nothing in the record to support it. The Opposer requests that the Board strike it from the record and to admonish the Applicant.

WHEREFORE, the Opposer prays that the Board clarify its decision of March 9, 2004, and grant Opposer's motion for reconsideration.

By: _____

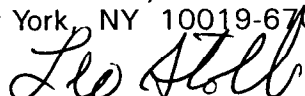
Leo Stoller
CENTRAL MFG. CO., Opposer
Trademark & Licensing Dept.
P.O. Box 35189
Chicago, Illinois 60707-0189
773-283-3880 FAX 708 453-0083

Date: May 5, 2004

Certificate of Service

I hereby certify that this motion is being deposited with the U.S. Postal Service by **Express Mail No: ER 695139397 US** in an express mail envelope addressed to:

Lacy H. Koonce
Lance Koonce
DAVIS WRIGHT TREMAINE LLP.
1633 Broadway
New York, NY 10019-6708



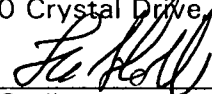
Leo Stoller

Date: May 5, 2004

Certificate of Mailing

I hereby certify that the foregoing motion is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to:

TTAB/NO FEE
Assistant Commissioner of Patents and Trademarks
2900 Crystal Drive, Arlington, Virginia 22202-3513



Leo Stoller

Date: May 5, 2004

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CENTRAL MFG. CO.
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P O Box 35189
Chicago, IL 60707-0189

Opposition No: 123,765

Opposer,

Trademark: HYPERSONIC

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Charlotte, NC 28217



Applicant

05-10-2004

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

Box TTAB/NO FEE

NOTICE OF DEPOSITION

Please take Notice that Opposer will take the deposition upon oral examination, of the President of VIACOM, INC., **Mel Karmazin**, before a Notary Public or other office authorized by law to administer oaths. The deposition will be held at the offices of *Davis Wright Tremaine, LLP, 1633 Broadway, New York, New York, 10019* on **April 21, 2004** commencing at **11:00 a.m.**, or such other date, time and place as mutually agreed upon by counsel. The testimony will be stenographically recorded. You are invited to attend and cross-examine.

By: Leo Stoller

Leo Stoller
CENTRAL MFG. CO., Opposer
Trademark & Licensing Dept.
P.O. Box 35189
Chicago, Illinois 60707-0189
773-283-3880 FAX 708 453-0083

Date: April 2, 2004

Certificate of Service

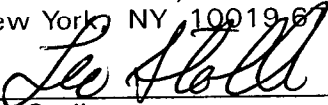
I hereby certify that this *Notice of Deposition* is being deposited with the U.S. Postal Service by first class mail in an envelope addressed to:

Leo Stoller
Date: April 2, 2004

Certificate of Service

I hereby certify that this *Notice of Deposition* is being deposited with the U.S. Postal Service by **Express Mail** No: **ER 854975740 US** in an express mail envelope addressed to:

Lacy H. Koonce
Lance Koonce
DAVIS WRIGHT TREMAINE LLP.
1633 Broadway
New York, NY 10019-6708




Leo Stoller
Date: April 8, 2004

Certificate of Mailing

I hereby certify that the foregoing *Notice of Deposition* is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to:

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Assistant Commissioner of Patents and Trademarks
2900 Crystal Drive, Arlington, Virginia 22202-3513



Leo Stoller
Date: 5-5-04

**IN THE UNITED PATENT & TRADEMARK OFFICE
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Applicant

Box TTAB/NO FEE

NOTICE OF DEPOSITION

Please take Notice that Opposer will take the deposition upon oral examination, of the Chairman of VIACOM, INC., **Sumner M. Redstone**, before a Notary Public or other office authorized by law to administer oaths. The deposition will be held at the offices of *Davis Wright Tremaine, LLP, 1633 Broadway, New York, New York, 10019* on **April 21, 2004** commencing at **2:00 p.m.**, or such other date, time and place as mutually agreed upon by counsel. The testimony will be stenographically recorded. You are invited to attend and cross-examine.

By: _____



Leo Stoller
CENTRAL MFG. CO., Opposer
Trademark & Licensing Dept.
P.O. Box 35189
Chicago, Illinois 60707-0189
773-283-3880 FAX 708 453-0083

Date: April 2, 2004

Certificate of Service

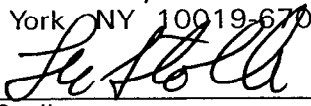
I hereby certify that this *Notice of Deposition* is being deposited with the U.S. Postal Service by first class mail in an envelope addressed to:

Leo Stoller
Date: April 2, 2004

Certificate of Service

I hereby certify that this *Motion to Compel* is being deposited with the U.S. Postal Service by **Express Mail** No: **ER 854975740 US** in an express mail envelope addressed to:

Lacy H. Koonce
Lance Koonce
DAVIS WRIGHT TREMAINE LLP.
1633 Broadway
New York, NY 10019-6708

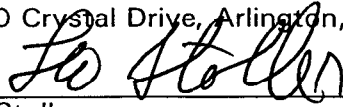


Leo Stoller
Date: April 7, 2004

Certificate of Mailing

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Assistant Commissioner of Patents and Trademarks
2900 Crystal Drive, Arlington, Virginia 22202-3513



Leo Stoller

Date: 5-5-07

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PARAMOUNT PARKS, INC.
8720 Red Oak Blvd.
Charlotte, NC 28217

Applicant

Box TTAB/NO FEE

NOTICE OF DEPOSITION

Please take Notice that Opposer will take the deposition upon oral examination, of the Chief Financial Officer of VIACOM, INC., **Richard J. Bressler**, before a Notary Public or other office authorized by law to administer oaths. The deposition will be held at the offices of *Davis Wright Tremain, LLP, 1633 Broadway, New York, New York, 10019* on **April 21, 2004** commencing at **4:00 p.m.**, or such other date, time and place as mutually agreed upon by counsel. The testimony will be stenographically recorded. You are invited to attend and cross-examine.

By: 

Leo Stoller
CENTRAL MFG. CO., Opposer
Trademark & Licensing Dept.
P.O. Box 35189
Chicago, Illinois 60707-0189
773-283-3880 FAX 708 453-0083

Date: April 2, 2004

Certificate of Service

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Leo Stoller

Date: April 2, 2004

Certificate of Service

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Lacy H. Koonce
Lance Koonce
DAVIS WRIGHT TREMAINE LLP.
1633 Broadway
New York, NY 10019-6708

Leo Stoller

Date: April 7, 2004

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Assistant Commissioner of Patents and Trademarks
2900 Crystal Drive, Arlington, Virginia 22202-3513

Leo Stoller

Date: 5-5-04

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